

IT 95-80

Tax Type: INCOME TAX

Issue: Penalty Under 1002(d) - Failure To File/Pay Withholding

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS

v.

XXXXXX,
Taxpayer

)
)
) Docket No.:
) FEIN or SSN:
)
) Harve D. Tucker,
) Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

APPEARANCES: XXXXX of XXXXX, for XXXXX.

SYNOPSIS: This matter comes on for hearing pursuant to the Taxpayer's timely protest to the Notice of Deficiency dated April 14, 1994. At issue is whether the Taxpayer is liable for the 35 ILCS 5/1002(d) penalty equal to the amount of the unpaid withholding tax owed by XXXXX. Following the hearing, submission of all evidence and a review of the record, it is recommended that this matter be resolved in favor of the Taxpayer.

FINDINGS OF FACT:

1. The Taxpayer was the Secretary of XXXXX (hereinafter sometimes referred to as "the company"). She did no work as Secretary. She held no other positions with the company. Tr., pp.6, 12

2. The Taxpayer did no other work for the company and spent no time there, except to visit or pick up her husband, who was President of the company. She received no salary, dividends or any benefits, like health insurance from the company. Tr., p.7

3. During the period at issue, the Taxpayer was working full-time as a receptionist and customer service representative for another company. Tr., p.11

4. She had no access to the books and records of the company. Tr.,

5. She had no authority to disburse funds of the company. She never signed any checks, saw the check register or reviewed any bank statements. She was not aware of what bills were being paid and what bills were not being paid. Tr., p.8

6. She was not familiar with the procedures for filling out and filing state withholding forms. Tr., p.9

7. XXXXX signed all of the withholding tax forms. The Taxpayer did not become aware of the withholding tax liability until after the company went out of business. Tr., pp.9, 13

8. She did not own any stock in the company. Tr., p.6

CONCLUSIONS OF LAW: 5 ILCS 5/1002(d) provides:

Willful failure to collect and pay over tax. Any person required to collect, truthfully account for, and pay over the tax imposed by this Act who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. * * * For purposes of this subsection, the term "person" includes an individual, corporation or partnership, or an officer or employee of any corporation . . . who as such officer (or) employee is under a duty to perform the act in respect of which the violation occurs.

The record clearly establishes that the Taxpayer was an officer of the company in name only. She never exercised any powers or duties as Secretary and never participated in any of the company's business operations, management or other activities. Specifically, she had no control or responsibility with regard to disbursements, particularly the filing and payment of the company's withholding tax returns.

It is, therefore, recommended that a final decision be issued consistent with the determinations memorialized above and that the Notice of Deficiency be cancelled in its entirety.

Harve D. Tucker
Administrative Law Judge

Date